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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORP.,

Petitioner,

v.

BRIAN F. WEBER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CITY OF LOS ANGELES AS AMICUS CURIAE

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This brief of the City of Los Angeles, as Amicus Curiae, is filed by the City Attorney pursuant to Rule 42(4) of the

Rules of the Supreme Court.

INTERESTS OF THE AMICUS CURIAE

The City of Los Angeles is a municipal corporation within the State of California. The interests of the City arise from its position as a public sector employer which has a Charter responsibility to staff its city departments in a way which will effectuate the accomplishment of municipal goals, consistent with civil service merit principles.

Further, the City of Los Angeles has an interest in defending its personnel actions in litigation. In recent years, the City of Los Angeles has been sued in Title VII actions brought by the Federal Government on two occasions, one involving alleged race and sex discrimination in its Police Department, and the other involving alleged race discrimination in its Fire Department. The latter case was settled by consent decree in 1974.

Pursuant to that consent decree, the City began a program of race-conscious hiring for the Los Angeles City Fire Department. That program was challenged by certain applicants for the Firefighter

classification in a lawsuit filed in 1977. That litigation is currently pending in U.S. District Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, the Amicus argues that Title VII of the 1964 Civil Rights Act implemented substantive standards which parallel those under the Fourteenth Amendment of the United States Constitution. Therefore, an employer may demonstrate the lawfulness of a race-conscious method of selection by demonstrating a compelling need for integration in a workforce combined with a showing of the necessity for the selection method being utilized.

As a case study of a situation in which a race-conscious selection method may be justified by both a compelling need and necessity, the Amicus relates its experience in hiring Firefighters for the City of Los Angeles. For over a decade the Amicus attempted various ways to appoint minority Firefighters without noticeable success. If was only after the implementation of a race-conscious selection method, adopted after a consent

decree with the United States Department of Justice, that the Amicus achieved dramatic gains in the representation of minorities.

Further, in the event that this Court reverses the decision of the United States Court of Appeals for the Fifth Circuit in this case, the Amicus asks that this Court correct the misinterpretations of Title VII made by the dissenting Judge in that decision. Specifically, the Amicus asks that this Court reiterate the usefulness of evidence of an employer's good faith in defending Title VII litigation, and reject the dissenting Judge's view that the only probative evidence in a Title VII case involving personnel tests is a formal validation study.

ARGUMENT

I.

EMPLOYERS MAY LAWFULLY UTILIZE RACE-CONSCIOUS TECHNIQUES OF SELECTING EMPLOYEES WHERE THERE IS A COMPELLING STATE INTEREST, AND WHERE SUCH TECHNIQUES ARE NECESSARY

The single biggest risk to the interests of this Amicus is that, in deciding the instant case, this Court may close the door to the utilization of race-conscious techniques of hiring under any circumstances covered by Title VII of the 1964 Civil Rights Act. In the paragraphs below, Amicus argues that, at least under certain circumstances, such techniques are necessary and lawful.

A. Race-Conscious Hiring in the Los Angeles City Fire Department: A Case Study Demonstrating the Necessity for Such a Program.

In the decade between 1964 and 1974, the City of Los Angeles experienced a dilemma not uncommon to many municipalities in the United States. First, various minority communities within this City were increasing dramatically, most

notably, the Black and Hispanic populations.[1] However, during that decade there was no increase in the representation of minorities in the sworn ranks of the Fire Department. Caucasians continued to comprise 95.9%[2] of those sworn positions. Indeed, of the 997 Firefighters appointed between 1964 and 1974, only 25 were Black, of which 13 had been appointed during 1973 and 1974.

1/ For example, in the three decades between 1940 and 1970 census, the percentage of Blacks in the total population of the City of Los Angeles grew from 4.2 percent to 17.9 percent. Similarly, in the two decades between the 1950 census and the 1970 census, the percentage of Spanish-surnamed individuals in the City grew from 7 percent to 18.4 percent.

2/ The facts set forth in this portion of the brief have been submitted to the U.S. District Court for the Central District of California in U.S. v. City of Los Angeles (Hoff, et al., Intervenors and Cross-Claimants), No. CV 72-1806-LTL in the following documents: "Affidavit of Jeff Pfau in Opposition to the Intervenors' Motion for Summary Judgment . . ." (filed September 1, 1978) and "Affidavit of [Chief] John C. Gerard in Opposition to the Intervenors' Motion for Summary Judgment . . . " (filed September 1, 1978).

Similarly, only 27 Hispanics had been appointed during that time period, 17 of whom had been appointed during the last two years. The Asian population, which also comprises an increasing percentage of the City's population, was represented by a single appointment during that decade.

The risk to the City from such a dismal record of appointments cannot be fully quantified. Firefighting tasks were becoming increasingly difficult in the minority communities. For example, minority students demonstrated little interest in Fire Department educational programs. Firefighters investigating the ownership of homes had difficulty obtaining information from residents of those communities.

The nature of Fire Department tasks require that Firefighters enjoy good relationships with the residents of its service community. Unless the community perceives that the Department is a fair institution, committed to equal employment opportunity, Firefighters will be unable to obtain the cooperation necessary to properly perform their functions.

After its 1974 consent decree with the Department of Justice, in which there was no finding or admission of discrimination, the City began a race-conscious hiring program accompanied by vigorous recruitment and the use of merit system tests to the extent possible, consistent with its race-conscious program. The result was startling. In approximately three and one-half years, from 1975 through the first half of 1978, the Fire Department appointed 190 Black Firefighters and 272 Hispanics of a total of 907. In addition, 45 Asians were appointed during that period. As a result of that program, the City's Fire Department is reversing its image as virtually an all-white organization.

However, the use of race-conscious hiring by the City to increase the effectiveness of its Fire Department was not without its legal risks. (As dissenting Judge Wisdom spoke metaphorically in the instant case, an employer is walking "a high tight rope without a net . . . ." Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 230 (5th Cir. 1977).) During 1977, the City was sued by 14 applicants for the

Firefighter classification, charging "reverse discrimination" in its race-conscious program. The City has lost two motions for summary judgment, and now faces a trial in that matter in mid-1979. United States v. City of Los Angeles, et. al., No. CV 72-1806-LTL (C.D. Cal.).

This Amicus submits that both the City's race-conscious hiring program and that of the employer herein should be considered lawful based upon this Court's resolution of Regents of the University of California v. Bakke, ____ U.S. ____, 98 S.Ct. 2733 (1978). The Bakke analysis, which also is applicable to the employer in the instant case, has two major premises: first, Title VII was intended to implement a constitutional standard; and, second, the Constitution does not forbid a race-conscious program of selection which meets the requisite legal tests.

B. The Legal Standards of Title VII in the 1964 Civil Rights Act, as Amended, are the Same as the Constitutional Standards: Race is a Permitted Classification Under Both Provisions.

One of the critical differences between the minority block of this Court

in Bakke (consisting of the Chief Justice, Justice Stewart, Justice Rehnquist, and Justice Stevens) and the majority (which included Justice Powell) is the legal issue regarding the standards under the Constitution and Title VI of the 1964 Civil Rights Act. Obviously, the threshold question to any court considering this matter is whether Title VII of the 1964 Civil Rights Act contemplated a standard which was different than that provided by the Fourteenth Amendment.

Although there is no Supreme Court case directly on point, the analysis of the Bakke decision and the legislative history of the 1964 Civil Rights Act, as amended, lead to one undisputable conclusion: that Title VII of the 1964 Civil Rights Act was intended to provide remedies for discrimination, and to apply the standards which previously had been articulated under the Fourteenth Amendment.

1. The Bakke Case Supports the View That Allegations of Discrimination are Measured by the Same Substantive Standards Under Title VII and the Fourteenth Amendment.

A basic conflict between the majority (including Justice Powell) and the

minority blocks of the Supreme Court in the Bakke case was whether the substantive standards of evaluating "discrimination" were more stringent under Title VI than they were under the Constitution. The minority justices emphasized that Title VI of the 1964 Civil Rights Act required absolute "color blindness" on the part of a recipient government.

Such a view of either Title VI or Title VII, of course, would require that all affirmative action plans, which are color-conscious by their very nature, be held unlawful. That view was rejected by a majority of the Court in both the Powell opinion and the opinion of Justices Brennan, White, Marshall and Blackmun. Those Justices found that Title VI "merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds " (Regents of Univ. of Calif. v. Bakke, 98 S.Ct. at 2768 (Op. of Justice Brennan, et al.)), and that the Constitution provided that race-conscious techniques of selection were lawful under certain limited circumstances.

Because of the parallel language found in Title VI and Title VII, the same substantive standard -- that of the Fourteenth Amendment -- was contemplated by both provisions. Compare 42 U.S.C. §2000d with 42 U.S.C. § 2000e-2(a).

2. An Examination of the Legislative History of Title VII Demonstrates That, in the 1964 Civil Rights Act, Congress Intended to Merely Provide Additional Remedies for Alleged Discrimination, and Did Not Modify Substantive Standards of the Fourteenth Amendment.

Examination of the legislative history of Title VII reveals that the Civil Rights Act of 1964 embodies constitutional standards. In originally promulgating Title VII in 1964, Congress relied on two clauses: (1) § 5 of the Fourteenth Amendment (see 110 Cong. Rec. 6553 (1964)); and (2) the Commerce Clause (110 Cong. Rec. 14448 (1964)). Portions of the 1964 legislative debates indicate that constitutional principles were to be embodied in Title VII of the Civil Rights Act:

> [T]his title would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity.
>
> * * *
>
> All this is subject to one qualification, and that qualification is to state: "In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin, or sex."
>
> This is all this provision does. It would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws. [110 Cong. Rec. 13079-80 (1964). (Emphasis added.)]

Moreover, responding to the question whether it is a constitutional right to have a job, one of the proponents of the bill, Senator Javits, stated that the Constitution protects a person from being denied a job solely on account of his race. The Senator stated,

> [H]e should not be denied a job because his skin is black. The basis of the 14th amendment is that every person similarly situated shall have the equal protection of the law. [110 Cong. Rec. 9603 (1964).]

Thus, Title VII shall be viewed as having enacted statutes which parallel the constitutional restraints against racial discrimination.

That interpretation is also supported by the legislative history preceding the 1972 amendments to Title VII. In 1969, the United States Commission on Civil Rights published its findings that state and local governments were engaging in policies and practices which denied minority group members equal employment opportunities. The Commission expressed particular concern about the absence of significant numbers of Blacks holding positions in fire departments throughout the country. 118 Cong. Rec. 1817 (1972). Consequently, the Commission made recommendations as to how state and local governments should comply with the obligations of the Equal Protection Clause. Those recommendations, later recorded in the Congressional Record, included the following:

> Every State and local government should adopt and maintain a program of employment equality adequate to fulfill its obligation under the equal protection clause of the 14th amendment to assure --
>
> 1. that current employment practices are nondiscriminatory; and
>
> 2. that the continuing effects of past discriminatory practices are undone. [118 Cong. Rec. 1817 (1972).]

On the basis of those findings and recommendations, Congress moved to amend Title VII in 1972 to include state and local governments within the definition of "employer", to provide public employees with the same remedies previously available only to private employees. See 1972 U.S. Code Cong. & Ad. News 2153-54. However, throughout the 1972 legislative debates, proponents of the amendments emphasized that the amendments enacted constitutional principles. Senator Williams remarked,

> The 14th amendment guarantees equal treatment of all citizens by states and their political subdivisions, and the Supreme Court has reinforced this directive by holding that state action which denies equal

protection of the laws to any person is in violation of the 14th amendment. It is thus clear that the guarantee of equal protection must extend to discriminatory practices of state and local governments, where such discrimination is based upon race, color, religion, sex or national origin. [118 Cong. Rec. 1816 (1972).]

In an interchange between Senators Ervin and Williams, it was made clear that constitutional principles were to govern the application of Title VII to the states.

> Mr. Williams: If the Senator is talking about racial discrimination or preference, the 14th amendment goes back more than one hundred years. There, the constitutional equality is protected. What we are doing is exactly what is suggested in the 14th amendment, section 5:
>
> > The Congress shall have power to enforce by appropriate legislation, the provisions of this article.
>
> And here we are, legislating.
>
> Mr. Ervin: One of the provisions of that amendment is that nobody shall be deprived of liberty without due process of law; and at one time the 14th amendment was construed to mean that a man had liberty of contract, which this bill would take away.

> Mr. Williams: Nor deny to any person within its jurisdiction the equal protection of the laws. People are protected in this country against discrimination because they are black. The Constitution has said it, and what we are doing now is making sure that the Constitution means what it says. It is as simple as that. [118 Cong. Rec. 309 (1972).]

What emerges from the debates and reports is Congressional intent to ensure that private and public employers comply with the constitutional mandate to not discriminate on the basis of race. In amending Title VII in 1972, Congress acted to include state and local governments and to require them to act in conformance with the Equal Protection Clause of the Fourteenth Amendment. Therefore, the Fourteenth Amendment, Title VII, and Title VI must be interpreted consistently to require the same substantive standards.

3. In Any Event, Congress Did Not Have the Power, Under Section 5 of the Fourteenth Amendment, to Extend Any More Stringent Standards on a State or Local Government Than That Which Was Provided by That Amendment.

Even if the legislative history and the Bakke analogy did not sufficiently

demonstrate that Title VII was implemented to provide the same substantive standards as the Fourteenth Amendment, such an interpretation is compelled by the Tenth Amendment of the United States Constitution and the concepts of federalism. As the Honorable Jesse W. Curtis, United States District Judge, stated in an analogous situation:

> [I]f applying Title VII standards to local and state agencies brings into play a standard more stringent than appropriate under the Fourteenth Amendment, there would appear to be a constitutional conflict with the Tenth Amendment. [Blake v. City of Los Angeles, 435 F.Supp. 55, 63 (C.D. Cal. (1977)) (9th Cir. appeal pending).]

Although the United States Supreme Court has not yet reached the issue of the constitutionality of the 1972 amendments pertaining to local governments (see Dothard v. Rawlinson, 433 U.S.321,323 n.1 (1977); Hazelwood School District v. United States, 433 U.S. 299, 306 n.12 (1977)), both the Tenth

Amendment and the concepts of federalism embodied in the Constitution stand as a bar to any extension of a substantive standard beyond that provided by the Fourteenth Amendment.

Because the substantive standards of the Fourteenth Amendment are the only standards which may constitutionally apply to municipalities, the analysis of a race-conscious classification must be the same under Title VII as that which was utilized by the majority of the Supreme Court in the Bakke decision. That analysis must also apply to private sector employers if Title VII is to "be applied to governmental and private employers alike." Dothard v. Rawlinson, supra, 433 U.S. at 331 n.14.

C. The Lawfulness of Kaiser's Affirmative Action Program for Craft Positions Should be Determined by Reference to the Bakke Analysis.

Generally speaking,

> Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. [Regents of Univ. of Calif. v. Bakke, supra, 98 S.Ct. at 2749.]

Therefore, the Supreme Court has held

> that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."
> [Id. at 2756-57. (Powell Opinion, citing cases.)]

As the first prong of the two-part Powell analysis of a race-conscious classification, this Court should examine whether there is a compelling state interest in the integration of the craft positions at issue in this litigation.

Secondly, Kaiser must demonstrate that the program challenged in this litigation was necessary to the furtherance of that compelling interest. From the Amicus' experience with the Firefighter classification (see pp.5-8, supra), it knows of the utter futility of attempting to integrate a portion of an employer's workforce which has few minorities by other than race-conscious means. In fact, throughout the decade of the 1960's, the City attempted one program after another

to effectively attract and appoint minorities to the Fire Department without noticeable success. For example, in 1960, at the behest of representatives of the minority community, this Amicus mandated that interview boards must consist solely of raters from outside City service.[3/] Next, in 1961, the Amicus abandoned the interview as a ranking device, and utilized a written examination to rank fire candidates to avoid charges that the interview was biased against minorities. However, because of the lack of results in that method of testing, the City of Los Angeles reinstated the oral interview in 1965.

In 1967, this Amicus began active recruitment of minority persons for the Firefighter classification, but it was not until the implementation of the race-conscious hiring program in 1974 that the numbers of minorities inducted rose dramatically to the present levels. In

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[3/] The facts in this paragraph are found in U.S. v. City of Los Angeles, supra, at "Affidavit of Muriel Morse in Support of Defendant's Motion for Summary Judgment (filed January 25, 1974).

the five years following the implementation of that program, the percentage of Caucasians among sworn firefighting personnel has declined from 95.9 percent in 1974 to 85.5 percent in 1978. Concomitantly, the percentage of Blacks has more than doubled from 1.5 percent to 3.8 percent, and the percentage of Spanish surnamed individuals (or "Hispanics") has tripled from 2.6 percent to 8.5 percent. Based on its experience, this Amicus submits that a race-conscious program of hiring or training may often be the only way for an employer to substantially integrate a workforce.

II.

IF THE COURT REVERSES THE FIFTH CIRCUIT'S WEBER DECISION, CERTAIN LEGAL MISPERCEPTIONS OF THE DISSENTING JUDGE SHOULD BE CORRECTED

Although the dissenting opinion of the Honorable John Minor Wisdom, Senior Circuit Judge, demonstrated remarkable sensitivity to the problems of an employer, he also made two major errors in his legal analysis which could have far-reaching ramifications if they are not

corrected by this Court at the time of a reversal of the Weber case. The first of those errors is his assertion that "[g]ood faith . . . is not a defense to Title VII." Weber v. Kaiser Aluminum & Chemical Corp., supra, 563 F.2d at 232. Secondly, Judge Wisdom consistently refers to "Title VII's requirement that employment tests must be validated . . . ." Id. at 236. Those points are discussed below.

A. The Focus of a Title VII Suit is Whether Discrimination Exists, and Evidence of Good Faith is Probative in the Defense of a Title VII Suit.

Judge Wisdom's belief that "good faith . . . is not a defense to Title VII" most likely results from his interpretation of this Court's language in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). There, this Court stated that when employment procedures or testing mechanisms operate as "headwinds" to minority groups, and when those procedures or tests are "unrelated to measuring job capability", an employer's nondiscriminatory subjective intent does not "redeem" the use of those practices or tests. Id. The Duke Power

Company had used an apparently specious classification system (an all Black "Labor" department in which workers were paid less than the incumbents of the white "Coal Handling" department), and had implemented the use of standardized intelligence tests unrelated to either classification on the very day that Title VII became effective. Id. at 427. On the basis of those facts, this Court held that evidence of managers' intent would not vitiate the obviously discriminatory practice.

However, this Court has never held that the employer is to be strictly liable for the effects of an employment procedure, regardless of his or her state of mind. Indeed,

> The central focus of the inquiry in a [Title VII case] is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." [Furnco Construction Co. v. Waters, ____ U.S. ____, 98 S.Ct. 2943, 2949 (1978).]

Because the central focus of a Title VII case is the existence of unlawful discrimination, evidence of an employer's good faith is surely relevant, and, in an appropriate case, that evidence may be

determinative.

B. In Reversing the Weber Case, This Court Should Correct Judge Wisdom's Impression that Title VII Requires That Personnel Tests Be Subjected to the Experimental Process of "Validation".

In his dissent, Judge Wisdom on several occasions refers erroneously to the "Title VII [] requirement that employment tests must be validated . . . ." See Weber v. Kaiser Aluminum Company, supra, 563 F.2d at 236. Indeed, at one point he goes so far as to invent a new legal standard for the review of employment tests, stating that those tests must be "job-validated". Id. Such a standard misperceives the state of the law and the state of the science of industrial psychology, and is potentially damaging to employers seeking to achieve merit selection apart from the necessary and compelling use of race-conscious methods in certain situations.

As the Cities of Los Angeles and San Diego explained in their amicus brief filed in Detroit Edison Company v. National Labor Relations Board, Sup. Ct. No. 77-968, a personnel test is useful to an employer, if, generally speaking, individuals performing

relatively better on the test generally perform relatively better on the job. In a broad sense, the extent to which a test is capable of predicting the success of employees on a job is its "validity". E. McCormick and J. Tiffin, Industrial Psychology 101 (6th Ed. 1974).

However, lawyers and judges often confuse the concept of "validity" with a formal "validation study". For example, a statistical validation study is a written report of an experimental evaluation of the validity of a test, conducted by an industrial psychologist pursuant to certain scientific principles. Although experimentalists in the field of test validation uniformly stress the desirability for such formal evaluation[4/] a "valid" test may or may not have been "validated". Further, a test which was once "validated" may or may not continue to be "valid" for a particular job if there have been shifts in such variables as the nature of applicant population.

[4/] See, e.g., E. McCormick & J. Tiffin, Industrial Psychology, supra, at 102.

See R. Guion, Personnel Testing 21 (1965).

Although the statute does not mention the need for "validation", it has become popular for plaintiffs and compliance agencies to demand such experimental studies as evidence of job-relatedness because of the difficulty of such analysis. As Mr. David Rose, the Justice Department staff representative to the Equal Employment Opportunity Coordinating Council wrote in 1976,

> [T]he thrust of the present [EEOC] guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring. [Rose, "Memorandum for the Deputy Attorney General Re: Selection Guidelines" (April 12, 1976), published in the Bureau of National Affairs' Daily Labor Report, No. 121, pp. AA-2 et seq. (June 22, 1976).]

The specific fallacies in the various compliance agency guidelines discussing "validation" are well documented and will not be repeated here. See, e.g.,

"Brief of City of Los Angeles and City of San Diego as Amici Curiae in Support of Petitioner", Detroit Edison Co. v. National Labor Relations Board, Sup. Ct. No. 77-968, at pp. 18-25.

While Judge Wisdom's innovation of the requirement of "job validation" is consistent with the views of certain compliance agencies, it is inconsistent with prior interpretations of Title VII made by this Court. For example, in Griggs v. Duke Power Co., supra, 401 U.S. at 432, the employer's personnel tests were rejected because they were "unrelated to measuring job capability", rather than any failure to subject those tests to a process of "validation".

Further, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), while rejecting a last minute half-day validation study as appropriate evidence to support the job-relatedness of standardized intelligence tests for relatively unskilled jobs, this Court established that a formal validation study was not the sine qua non of a demonstration of job relatedness. For example, this Court specifically stated that

"[t]he concept of job relatedness takes on meaning from the facts of the Griggs case." Id. at 426. Looking at those facts, this Court reviewed the intent of the employer,[5/] and the preparation that the employer made for instituting the testing program.[6/]

5/ "Neither [intelligence test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 426, quoting Griggs v. Duke Power Co., supra, 401 U.S. at 428.

6/ "Both [intelligence tests] were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job performance ability." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 426, quoting Griggs v. Duke Power Co., supra, 401 U.S. at 431.

Secondly, in the Albemarle case, this Court recognized that "[t]he question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." Id. at 427. Therefore, the facts surrounding the implementation of a testing program, such as the existence of a civil service merit system, should be influential in determining whether a test is "job related". However, under Judge Wisdom's standard, a District Court would look only to the formal experimental "validation" study; and would not consider the needs, motives, and implementation procedures of an employer utilizing a personnel test.

This Amicus urges the Court, if it reverses the Fifth Circuit's Weber decision, to reject Judge Wisdom's view that whether an employer is to be guilty of employment discrimination in a personnel testing case is measured solely by the quality of a formal process of "validation". Further, it asks this Court to reiterate its standards pronounced in Griggs in a manner which will make it unmistakably clear that the central focus in any Title

VII litigation is whether actual discrimination exists, rather than whether a formal experimental study is technically perfect.

CONCLUSION

For the reasons expressed in the foregoing pages, the Amicus asks that this Court recognize the legitimate use of race-conscious selection techniques in certain employment situations. The Amicus suggests that the Court reach that decision through an application of its Bakke decision, and that it specifically hold that Title VII was intended to implement constitutional standards of nondiscrimination in employment.

The Amicus also suggests that this Court should reject certain views of the dissenting Judge in the Fifth Circuit's decision. To overcome any erroneous inferences that might arise from his opinion, this Court should reiterate that the issue of discrimination is one in which the Court deciding the matter may draw upon any and all possible

evidence going to the issue which is the central focus of Title VII cases: whether there has been any unjustifiable discrimination against an individual by an employer.

Respectfully submitted,

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